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**Writer's Direct Number:
202/962-4897**

July 21, 1997

VIA Messenger
William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: CC Docket No. 95-155 - Request for Further Comments

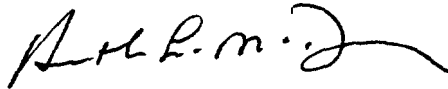
Dear Mr. Caton:

Enclosed for filing please find an original and ten (10) copies of the Supplemental Comments of the Direct Marketing Association in the above-referenced docket.

We are also providing one additional copy of the Supplemental Comments, which we kindly ask that you date-stamp and return to the messenger. We appreciate your assistance.

Please contact me if you have any questions.

Sincerely,



Heather L. McDowell

Enclosures

Noted for filing
Date: 7/21/97

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 21 1997
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In the Matter of)
) CC Docket No. 95-155
Toll Free Service Access Codes)

**SUPPLEMENTAL COMMENTS OF THE
DIRECT MARKETING ASSOCIATION**

Pursuant to the Commission's July 2, 1997 Public Notice, The Direct Marketing Association (The DMA) submits these supplemental comments concerning the reservation and assignment of toll-free vanity numbers.

I. DEVELOPMENTS SINCE THE CLOSE OF THE RECORD CONFIRM THE NEED TO PROTECT LEGITIMATE INTERESTS OF INCUMBENT TOLL-FREE SUBSCRIBERS

In its original comments in this proceeding, The DMA argued that the only rational, and equitable, solution to the problem of vanity and branded numbers is to grant holders of a telephone number in one toll-free SAC the right of first refusal to obtain the same number in any succeeding SAC or -- at the election of the incumbent subscriber -- to permit the release of the number in succeeding SACs on condition that a particular acronym not be used with that number.^{1/} We sought this remedy in order to protect legitimate interests of incumbent holders of so-called vanity or branded numbers, to avoid consumer confusion, and to

^{1/} See Comments of Direct Marketing Association, in Toll Free Service Access Codes, CC Docket No. 95-155, at 12-17 (November 1, 1995) ("DMA Comments").

assure the efficient and orderly distribution of toll-free numbers as new SACs are introduced. Implicitly, at least, the Commission has recognized the legitimacy of these concerns through its decision to permit incumbent vanity-number holders to reserve the corresponding number in the 888 SAC.^{2/}

Developments since the Commission's last request for comments in this proceeding confirm that the concerns of The DMA and other representatives of incumbent vanity-number holders are well founded. There have been reports of situations in which, by mischance, numbers in the reserve pool have been inadvertently released and, as The DMA and others predicted, the results have been consumer confusion and anti-competitive or potentially anti-competitive conduct. To their credit, the RespOrgs have acted responsibly in these situations. There have also been situations in which vanity numbers in the 800 SAC were not reserved and were therefore released to other users who were unaware of the incumbent's use of the vanity number. In those cases, even though the two subscribers were not in competition (or in the same line of business), there has been consumer confusion, cost, and loss of business both to the incumbent and the second subscriber to a particular vanity number, and these problems have proven difficult to resolve. These experiences, albeit mitigated by the Reserve Order, serve to confirm the fact that, unless the Commission adopts a means of distributing so-called vanity numbers which fairly

^{2/} Toll Free Service Access Codes, Report and Order, 11 FCC Rcd 2496 (1996) ("Reserve Order").

protects incumbent users, serious legal issues and harm to the economy will ensue with the opening of each successive toll-free SAC.

There have been two other developments since the Commission last received comments on the subject of vanity numbers that bear upon the proper resolution of this docket. First, proposals have been advanced in Congress and elsewhere urging that the Commission auction vanity numbers or, alternatively, arrange for the numbers to be issued through some form of lottery. Second, the Commission has promulgated regulations which are designed to prevent and, as appropriate, sanction the warehousing and brokering of toll-free numbers.^{3/}

As we discuss more fully in succeeding sections of these comments, the auction/lottery solutions are profoundly misguided. We need not dwell at any length on the question of the Commission's legal authority to select either of these solutions: The Commission simply does not have the statutory authority to auction toll-free numbers and its power to issue such numbers through lottery is equally infirm. In any case, as we show in these Supplemental Comments, these solutions are unsound as a matter of policy. It may be true, as a general proposition, that marketplace solutions are preferable to governmental mechanisms as a means of distributing public resources. But that is true only if the resource is and is intended to be a tradable commodity. The Commission has, through its anti-brokering and anti-warehousing rules, declared that toll-free

^{3/} Toll Free Service Access Codes, ____ FCC Rcd ____, CC Dkt. No. 97-123, FCC No. 97-123 (adopted April 4, 1997).

numbers are not a tradable commodity. Moreover, we show that, even if it were possible as a policy matter to reconcile the notion of an auction/lottery solution with the purposes of the anti-brokering rules, these solutions -- as well as the standard industry code solution originally advanced by the Commission -- simply will not work as a practical matter.

Accordingly, developments since the Commission last received comments confirm that the only rational and practical solution to the issue of vanity numbers is for the Commission to adopt a rule that gives incumbent users of vanity or branded numbers a right of first refusal for a corresponding number in a newly deployed SAC, and that permits incumbent users to release the use of the same 7-digit number in a new SAC on condition that subsequent subscribers not use a particular acronym associated with that number.

II. THE AUCTION/LOTTERY SOLUTION WOULD UNDERMINE THE ANTI-BROKERING RULES

The DMA generally supports the Commission's adoption of rules that expressly prohibit toll-free number brokering, hoarding, and warehousing. Such conduct impairs full and fair access to toll-free numbers and threatens incumbent vanity subscribers' investment in their numbers. A toll-free number auction or lottery, however, would invite the very same brokering practices that the Commission has condemned. It would imply that vanity and branded numbers can be purchased or sold.

The new rules are a positive step, but by no means a complete solution to the problem of brokering. Comments submitted by some RespOrgs and carriers

highlight potential shortcomings of the new rules. There will be difficulties in monitoring compliance and enforcing the prohibitions on number warehousing. And, it remains to be seen whether the Commission is, as a practical and legal matter, able to move aggressively to challenge subscribers that try to extort money or in-kind services in exchange for a number. Furthermore, if the rules are going to have any appreciable or lasting impact, the Commission must also be able to exercise -- and enforce -- its authority to issue monetary forfeitures. This too, is untested. As a result, it is not yet clear how effectively the rules by themselves will deter brokering, hoarding, or warehousing. Thus, a mechanism for distributing numbers is also required to minimize monitoring and enforcement needs and costs.

A decision to distribute toll-free numbers by auction or lottery cannot be reconciled with the policy predicates underlying the new rules. Such a distribution mechanism would tend to encourage the very practices that the new rules are designed to suppress, and will compound the monitoring and enforcement problems associated with those rules. Notwithstanding the Commission's anti-brokering rules, an auction or lottery would imply -- if not embrace -- the notion that toll-free numbers are a tradable commodity. The Commission simply cannot have it both ways. If, as the anti-brokering rules plainly establish, toll-free numbers are not a tradable commodity, then reliance on an auction or lottery to allocate any of these numbers is unsound as a matter of policy.

III. THERE IS NO WORKABLE DEFINITION OF A "VANITY" NUMBER

In any case, the auction/lottery solution poses an insuperable practical problem. The Commission would have to craft definitions of "vanity" and "branded" toll-free numbers. No such definitions now exist, and these terms are not self-defining. In the broadest sense, many believe that a vanity number is one that is closely associated with an acronym. The numbers 800-CALL-ATT, 800-FLOWERS, 800-COLLECT, and 800-MATTRESS illustrate the types of numbers that tend to come to mind. Yet it is not necessary that a number form an acronym to be valuable to its holder or entitled to legal protection. For example, a radio station might use a number that incorporates its AM or FM frequency, or some variation. Conversely, the fact that a set of numbers does form an acronym does not entail a conclusion that the acronym has value sufficient to be considered a vanity number.

The fact is that vanity numbers, like 800-FLOWERS, have gained their widespread recognition (and value) through marketing efforts and consumer use; any single sequence of 7 digits could form multiple acronyms, and the subscriber alone determines whether or not it will use the acronym formed by those numbers. Therefore, a fundamental problem with an auction/lottery approach is that while the Commission must define vanity numbers before holding the auction or lottery, it is only after a number has been assigned, promoted, and put to use that it acquires or fulfills its special character as a "vanity" number. And,

when a number is initially reserved, only the subscriber knows how it intends to use or market the number.

Defining vanity numbers as those currently reserved -- approximately 350,000 -- pursuant to the Commission's previous orders in this docket is no answer. Among other things, it would ignore the reality -- as the Public Notice acknowledges -- that the supply of 888 numbers will be fully depleted sometime in 1998 or early 1999, and require the Commission to revisit the very same issues again.

A second possibility would be for the Commission to define as a "vanity" number any toll-free number that any subscriber specifically requests. But this, too, would ultimately fail. It would subject to the auction or lottery process telephone numbers that are not associated with any acronym or are not otherwise branded and for which there will be only one bidder or entrant (the original requesting subscriber), thus making the auction process meaningless.^{4/}

A third alternative would define vanity numbers as any toll-free number requested by two or more subscribers. A "vanity" number would, therefore, become a toll-free number for which there is competing demand. Under this test, the auction or lottery process would indeed resolve disputes. However, the Commission would have to establish a time-limited bidding "window" within which

^{4/} An example might include a request for 888-111-1000. A typical alpha-numeric keypad does not tie any letters to the numbers "1" or "0," so it would not be associated with an acronym. Yet it is appealing because it could be very easy to remember and, for that reason, a company offering toll-free customer service might specifically request it, even though no one else wants it.

subscribers would have to request their desired numbers. This solution would create far more problems than it would solve and would provoke endless rounds of litigation. For example, companies formed after the window closed, or that do not have an interest in a vanity number until after the window has closed, would be forever barred from obtaining one -- even though the particular number they want may still be available. The only alternative would be to schedule request windows on a weekly basis. Even if this were administratively feasible, the attendant costs would be prohibitive. On the other hand, companies that requested and received a vanity number might later choose not to use it, thereby wasting costly administrative resources.

The identical problem infects the Commission's proposal -- advanced in the NPRM and noted in the Public Notice -- to rely on Standard Industry Codes ("SIC") as the mechanism for preventing confusing and competing uses of an acronym associated with a particular toll-free number. The theory is that if only one company in a particular SIC is given a vanity number, there is no possibility of confusion. Despite its superficial appeal, this solution is, in fact, overly simplistic for two reasons. First, as The DMA has shown in its original comments, the SICs are simply too crude an instrument to guard against unfair competitive practices.^{5/} More importantly, the SIC mechanism pre-supposes that any toll-free number can, by some pre-existing definition, be identified as a vanity

^{5/} DMA Comments at 14, n. 5.

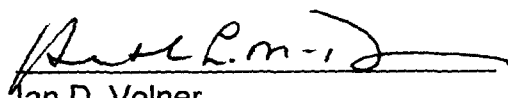
number and that is simply not the case. Thus, the Commission and RespOrgs could enforce the SIC mechanism only by requiring every subscriber seeking a toll-free number to supply a SIC code. Apart from the numerous administrative burdens that this would create, the fact is that individuals do not have SIC codes. Any person seeking to evade the purpose of the SIC requirement could do so by the simple expedient of acquiring numbers of potential value in their individual capacity and then seeking to broker them.

CONCLUSION

The remedy that The DMA has persistently urged upon the Commission is the only solution which recognizes the valid public policy considerations underlying the anti-brokering rules and the practical reality that there is no rational means to define a vanity number. The right of first refusal mechanism recognizes that it is only after a number has been assigned, promoted, and put into use that it acquires or fulfills its special character as a "vanity" or "branded" number. The option of allowing incumbent toll-free subscribers to authorize release of a number on condition that a particular associated acronym not be used with it, assures that this mechanism for the allocation of toll-free numbers is narrowly tailored to meet the purposes for which the mechanism exists -- avoiding consumer confusion and unfair competition. Enforcement of the stipulation that the acronym not be used would rest with the incumbent holder and, therefore, be no more difficult -- and in fact, less difficult -- to administer than the existing anti-brokering rules. The DMA respectfully submits that this approach is a marketplace solution precisely because it allows toll-free numbers

to be distributed in a fair and even-handed manner without embarking the government on the impossible -- and ultimately fruitless -- task of seeking to define a term which, in fact, is defined by the marketplace itself.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Ian D. Volner", is written over a horizontal line.

Ian D. Volner

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July 21, 1997